A

Eastmont Sdn Bhd v Tay Keong Kok & Ors

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCC-82–06 OF 2020
ROHANA ABD MALEK JC
13 MARCH 2022

C *Companies and Corporations — Fraudulent trading — Section 540 of Companies Act 2016 ('CA') — Common directors and/or shareholders and/or controllers of two related companies used one company to fraudulently wind up the other so that wound-up company would not have to settle its debts to creditors — Whether plaintiff-creditor adduced sufficient evidence for court to lift corporate* D *veil to discover how common directors/shareholders of the two companies had carried on business to defraud creditors — Whether parties to fraud could not distance themselves from actions of the companies on the ground they and the companies were separate legal entities — Whether s 540 of CA allowed court in a fit and proper case to lift the corporate veil and declare any person who had* E *knowingly participated in the fraudulent trading as personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as directed by the court*

F The defendants were the common directors and/or shareholders and/or ultimate controllers of two companies ('MP' and 'Dakota'). In reality, the first and third defendants were the real controlling minds and decision-makers in those two entities while the other defendants were their agents/nominees. In 2012, MP awarded the plaintiff a construction contract worth RM26m. The plaintiff completed its works but MP failed to pay the plaintiff a balance of G RM12,551,557.28 under the contract. The plaintiff sued to recover the said sum and when it carried out a search to find out MP's registered and business addresses for purpose of serving the cause papers, it discovered that MP and Dakota shared the same business address. Shortly after the writ of summons and statement of claim were served on MP, Dakota's solicitors informed the H plaintiff that Dakota had wound up MP in court for failing to settle a judgment sum. The judgment that Dakota had obtained against MP was a default judgment for failing to enter appearance to Dakota's suit. The plaintiff applied for leave of court to proceed with its suit against MP, but Dakota attempted to intervene in the proceedings to prevent the plaintiff from doing so. The court I dismissed Dakota's intervener application and allowed the plaintiff's leave application. After entering judgment in default of defence against MP in respect of its claim, the plaintiff commenced the instant suit under s 540 of the Companies Act 2016 ('the CA') against the defendants as the common directors and/or shareholders and/or ultimate controllers of MP and Dakota

on the ground that they had jointly and severally carried on business with intent to defraud creditors; specifically, that they had used Dakota to wind up MP so that MP would not have to pay its debt to the plaintiff. Section 540(1) of the CA empowered the court to declare any person who had knowingly been a party to the carrying on of the business of a company in the aforesaid manner personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as directed by the court. To achieve that end, the plaintiff requested the court to lift the corporate veil so that the entire fraudulent intent and scheme of the defendants to deny the plaintiff of payment of its debt was exposed.

Held, declaring the defendants jointly and severally responsible, without limitation of liability, for the debts of MP to the plaintiff and ordering them to pay the plaintiff RM17,012,816.88 as special damages and/or any amount awarded by the court (as assessed):

(1) The evidence revealed that the first and third defendants were the masterminds/controlling minds behind MP and Dakota and that the other defendants were merely their agents/nominees in order to avoid detection that the first and third defendants were the real controlling figures or minds behind both companies (see paras 56–57 & 62)

(2) The defendants failed to show any proof that MP had genuinely owed Dakota RM5,890,724.10 in order for Dakota to sue MP for that amount. MP then decided not to defend the claim and allowed judgment to be entered in default against it for that sum which then became the basis for Dakota to petition for MP's winding up. Dakota's financial reports did not show any debt owing to it by MP. Instead, the SSM search showed that MP had current assets of about RM12.6m and was making a profit after tax of RM7m. As such, there was no reason for Dakota to wind up MP, allegedly on the ground that it owed Dakota about RM6m. The winding up was to defraud MP's creditors, especially the plaintiff. MP was wound up notwithstanding that it was financially healthy. The winding up was a sham, an abuse of process of court and the defendants had wrongfully and deliberately conspired for the sole intention of injuring MP's creditors by denying them the payment of their debts, particularly that owing to the plaintiff (see paras 45–53, 66 & 69).

(3) The documentary and oral evidence adduced in this case established that the business of MP was carried out with the intent of defrauding the plaintiff and that the defendants were knowingly parties in the carrying out of that fraudulent purpose. They had planned the entire process from the entering of the judgment in default against MP to its winding up so that MP would not have to pay its creditors, including the plaintiff. Even when the plaintiff applied to the winding up court for leave to proceed

with its legal action against MP, the defendants had used Dakota to intervene in that application to frustrate or hinder its claim against MP (see paras 54–55 & 66).

(4) The defendants argued that they could not be linked in any way to the actions of the companies which were, in law, separate legal personalities. Section 540 of the CA ought to be invoked to ensure that the principle of separate legal personality and limited liability were not wrongfully taken advantage of. On the facts and evidence, there was basis for the court to lift the corporate veil of the companies to determine who were behind the companies that were responsible for the fraudulent winding up of MP. The plaintiff had proven its case on balance of probabilities to impute liability to the defendants and all of them were, accordingly, jointly and severally personally responsible, without any limitation of liability, for the debts of MP to the plaintiff and were liable to pay the plaintiff RM17,012,816.88 as special damages and/or any amount awarded by the court (to be assessed) to the plaintiff (see paras 64, 67–68 & 70).

[Bahasa Malaysia summary

Defendan adalah pengarah umum dan/atau pemegang saham dan/atau pengawal mutlak dua syarikat ('MP' dan 'Dakota'). Pada hakikatnya, defendan pertama dan ketiga adalah pengawal dan pembuat keputusan sebenar dalam kedua-dua entiti tersebut manakala defendan lain adalah ejen/penama mereka. Pada 2012, MP memberikan plaintif kontrak pembinaan bernilai RM26 juta. Plaintif menyiapkan kerjanya tetapi MP gagal membayar plaintif baki RM12,551,557.28 di bawah kontrak tersebut. Plaintif menyaman untuk mendapatkan semula jumlah tersebut dan apabila ia menjalankan carian untuk mengetahui alamat berdaftar dan perniagaan MP bagi tujuan menyampaikan kertas kausa, ia mendapati bahawa MP dan Dakota berkongsi alamat perniagaan yang sama. Tidak lama selepas writ saman dan pernyataan tuntutan disampaikan kepada MP, peguamcara Dakota memaklumkan plaintif bahawa Dakota telah menggulung MP di mahkamah kerana gagal menyelesaikan jumlah penghakiman. Penghakiman yang Dakota perolehi terhadap MP adalah penghakiman ingkar kerana gagal memasukan kehadiran dalam tindakan Dakota. Plaintif memohon kebenaran mahkamah untuk meneruskan tindakannya terhadap MP, tetapi Dakota cuba mencelah dalam prosiding untuk menghalang plaintif daripada berbuat demikian. Mahkamah menolak permohonan mencelah Dakota dan membenarkan permohonan kebenaran plaintif. Selepas memasukkan penghakiman ingkar pembelaan terhadap MP berkenaan dengan tuntutannya, plaintif memulakan saman semasa di bawah s 540 Akta Syarikat 2016 ('Akta') terhadap defendan sebagai pengarah umum dan/atau pemegang saham dan/atau pengawal muktak MP dan Dakota atas alasan bahawa mereka telah menjalankan perniagaan secara bersama dan berasingan dengan niat untuk menipu pemiutang; khususnya, bahawa mereka telah menggunakan Dakota untuk menggulung MP supaya

MP tidak perlu membayar hutangnya kepada plaintif. Seksyen 540(1) Akta memberi kuasa kepada mahkamah untuk mengisytiharkan mana-mana orang yang secara sedar telah menjadi pihak dalam menjalankan perniagaan syarikat mengikut cara yang dinyatakan di atas secara peribadi bertanggungjawab, tanpa had liabiliti, untuk semua atau mana-mana hutang atau liabiliti lain syarikat seperti yang diarahkan oleh mahkamah. Untuk mencapai matlamat tersebut, plaintif memohon mahkamah untuk mengangkat tirai korporat supaya keseluruhan niat penipuan dan skim defendan untuk menafikan plaintif pembayaran hutangnya terbongkar.

Diputuskan, mengisytiharkan defendan secara bersama dan berasingan bertanggungjawab, tanpa had liabiliti, untuk hutang MP kepada plaintif dan memerintahkan mereka membayar plaintif RM17,012,816.88 sebagai ganti rugi khas dan/atau apa-apa amaun yang diawardkan oleh mahkamah (seperti yang ditaksirkan):

(1) Keterangan mendedahkan bahawa defendan pertama dan ketiga adalah dalang/pemikiran mengawal di belakang MP dan Dakota dan defendan lain hanyalah ejen/penama mereka untuk mengelakkan pengesanan bahawa defendan pertama dan ketiga adalah pengawal sebenar atau fikiran di belakang kedua-dua syarikat tersebut (lihat perenggan 56–57 & 62)

(2) Defendan gagal menunjukkan sebarang bukti bahawa MP telah benar-benar berhutang kepada Dakota RM5,890,724.10 untuk membolehkan Dakota menyaman MP untuk jumlah tersebut. MP kemudian memutuskan untuk tidak membela tuntutan tersebut dan membenarkan penghakiman ingkar dimasukkan terhadapnya untuk jumlah tersebut yang kemudiannya menjadi asas untuk Dakota membuat petisyen bagi penggulungan MP. Laporan kewangan Dakota tidak menunjukkan sebarang hutang oleh MP. Sebaliknya, carian SSM menunjukkan MP mempunyai aset semasa kira-kira RM12.6 juta dan memperoleh keuntungan selepas cukai sebanyak RM7 juta. Oleh itu, tidak ada sebab untuk Dakota menggulung MP, atas dakwaan bahawa ia berhutang Dakota kira-kira RM6 juta. Penggulungan tersebut adalah untuk menipu pemiutang MP, terutamanya plaintif. MP telah digulung walaupun ia kukuh dari segi kewangan. Penggulungan tersebut adalah palsu, penyalahgunaan proses mahkamah dan defendan telah secara salah dan sengaja berkomplot untuk tujuan tunggal merugikan pemiutang MP dengan menafikan pembayaran hutang mereka, terutamanya yang terhutang kepada plaintif (lihat perenggan 45–53, 66 & 69).

(3) Keterangan dokumentari dan lisan yang dikemukakan dalam kes ini membuktikan bahawa perniagaan MP telah dijalankan dengan niat untuk menipu plaintif dan defendan-defendan secara sedar adalah pihak dalam melaksanakan tujuan penipuan tersebut. Mereka telah merancang

keseluruhan proses daripada memasukkan penghakiman ingkar terhadap MP hingga penggulungannya supaya MP tidak perlu membayar pemiutangnya, termasuk plaintif. Walaupun apabila plaintif memohon kepada mahkamah penggulungan untuk kebenaran meneruskan tindakan undang-undangnya terhadap Ahli Parlimen, defendan telah menggunakan Dakota untuk mencelah dalam permohonan tersebut untuk menggagalkan atau menghalang tuntutannya terhadap MP (lihat perenggan 54–55 & 66).

(4) Defendan-defendan berhujah bahawa mereka tidak boleh dikaitkan dalam apa-apa cara dengan tindakan syarikat-syarikat yang, dalam undang-undang, personaliti undang-undang yang berasingan. Seksyen 540 Akta sepatutnya digunakan untuk memastikan bahawa prinsip keperibadian undang-undang yang berasingan dan liabiliti terhad tidak diambil kesempatan secara salah. Berdasarkan fakta dan keterangan, terdapat asas untuk mahkamah mengangkat tabir korporat syarikat-syarikat untuk menentukan siapa di sebalik syarikat yang bertanggungjawab dalam penipuan penggulungan MP. Plaintif telah membuktikan kesnya pada imbangan kebarangkalian untuk mengaitkan liabiliti kepada defendan dan kesemua mereka, dengan sewajarnya, bertanggungjawab secara bersama dan berasingan, tanpa sebarang had liabiliti, untuk hutang MP kepada plaintif dan bertanggungjawab untuk membayar plaintif RM17,012,816.88 sebagai ganti rugi khas dan/atau sebarang amaun yang diawardkan oleh mahkamah (untuk ditaksirkan) kepada plaintif (lihat perenggan 64, 67–68 & 70).]

Cases referred to

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2015] MLRAU 413, CA (refd)

Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479; [2016] 4 MLRA 180, CA (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 MLRA 107, FC (refd)

Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors [2016] 11 MLJ 38; [2014] 6 MLRH 91, HC (refd)

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622; [2021] 4 MLRA, FC (refd)

Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 1 MLRA 238, CA (refd)

Legislation referred to

Companies Act 2016 ss 41, 540

Marcus Tan (with Eunice Kwong) (Ricky Tan & Co) for the plaintiff.
Rama Velu (with R Thigambari) (Rama Velu & Assoc) for the defendant.

Rohana Abd Malek JC:

INTRODUCTION

[1] This is an application by the plaintiff pursuant to s 540 of the Companies Act 2016 ('the CA') against the defendants who are the common directors and/or shareholders and/or ultimate controllers of Mega Planner Jaya Sdn Bhd ('Mega Planner') and Dakota Engineering Sdn Bhd ('Dakota') for jointly and severally carrying out businesses with the intent to defraud the creditors of the company by using Dakota to wind up the company in order to avoid repayment of debts due by Mega Planner to the plaintiff.

[2] After a full trial, I allowed plaintiff's application with cost of RM50,000. Below are the reasons for my decision.

BACKGROUND

[3] The plaintiff, Eastmont Sdn Bhd, a company involved in the building and construction business, was awarded a project by a company named Mega Planner Jaya Sdn Bhd on 3 August 2012 vide letter of award dated 3 August 2012 ('letter of award') to carry out sub-structure works for 16 level serviced apartment in Taman Melati, Kuala Lumpur for a sum of RM26m ('project').

[4] The plaintiff has completed its works in accordance with the letter of award, however, the letter of award was subsequently terminated mutually by the plaintiff and Mega Planner in December 2013 as a result of the default of payment of interim certificate by Mega Planner.

[5] On 10 June 2019, plaintiff filed a claim against Mega Planner at Kuala Lumpur High Court vide Suit No WA-22C-51–06 of 2019 to claim for the outstanding payment in the sum of RM12,551,557.28 due and owing by Mega Planner to the plaintiff.

[6] On 11 June 2019, the writ of summons and the statement of claim was served to the registered address and business address of Mega Planner. The business address of Mega Planner is the same as the business address of Dakota Engineering Sdn Bhd ('Dakota').

A **[7]** On 21 June 2019, plaintiff's solicitors Messrs Ricky Tan & Co received a letter from Dakota's solicitors to inform that Mega Planner has been wound up on 14 May 2019 vide Shah Alam High Court Winding Up Petition No BA-28NCC-97–02 of 2019 filed by Dakota.

B **[8]** The winding up petition filed by Dakota against Mega Planner was premised on a judgment in default of appearance dated 27 November 2018 vide Suit No 42–10 of 2018 ('JID').

C **[9]** Defendant 4 was the common directors of both companies, ie Dakota and Mega Planner, when Dakota initiated its action against Mega Planner on 3 October 2018. Defendant 4 only resigned as the director of Dakota on 30 November 2018 ie after Dakota had obtained JID against Mega Planner on 27 November 2018.

D **[10]** On 25 July 2019, plaintiff filed a leave application at the Shah Alam High Court vide the post Winding Up No BA-28PW-204–07 of 2019 to obtain leave from the court to proceed with the legal proceeding against Mega Planner.

E **[11]** On 5 August 2019, Dakota filed an application to intervene in plaintiff's leave application. On 30 October 2019, the Shah Alam High Court dismissed Dakota's intervener application and allowed plaintiff's leave application.

F **[12]** On 12 December 2019, plaintiff obtained a judgment in default of defense against Mega Planner ('JIDD'). After obtaining the JIDD, plaintiff discovered that Dakota and Mega Planner are related companies and have common shareholders and/or directors and/or ultimate controllers.

G **[13]** On 21 January 2020, plaintiff instructed its solicitors to issue a letter of demand ('LAD') to defendant 1 to defendant 6. The defendants have failed to reply to the said LAD and failed to make any payment to the plaintiff.

H **[14]** Therefore, plaintiff initiated this suit against the defendants who are the common directors and/or shareholders and/or ultimate controller of Dakota and Mega Planner.

THE PLAINTIFF'S CASE

I **[15]** The plaintiff's cause of action against the defendants are a breach of s 540 of the CA for carrying out business with the intent to defraud the creditors of the company and/or for fraudulent purposes and/or tort of fraud and/or conspiracy.

[16] The plaintiff submits that defendants have jointly and/or severally carried on the business of Mega Planner with the intent to defraud the creditors of the company for fraudulent purposes by using Dakota to wind up the company in order to avoid the repayment of debts due by Mega Planner to the plaintiff.

[17] It is an agreed fact that the winding up petition filed by Dakota against Mega Planner was premised on a judgment in default of appearance dated 27 November 2018 vide the Suit No BA22-42–10 of 2018 ('JID'). It is also an agreed fact that defendants had jointly and/or severally wind up Mega Planner vide Dakota by using the JID. Therefore, plaintiff submits that the corporate veil ought to be lifted against the defendants pursuant to s 540 of the CA 2016 and/or at common law and the defendants shall be personally responsible, for all the debts of Mega Planner.

[18] The plaintiff called only one witness to testify, namely Chuah Liang Chuan, a director who has been with plaintiff since 3 September 2012 and has been involved in the project for plaintiff and dealt with defendant 1 (Tay Keong Kok) and defendant 3 (Chua Choon Yang) for the project.

THE DEFENDANT'S CASE

[19] The defendants, in their defenses, contend that plaintiff's claim against the defendants individually as directors and shareholders is misconceived and devoid of merits under s 540 of the CA. The defendants are directors of properly constituted companies pursuant to and in accordance with the CA.

[20] The defendants plead that Dakota is a company of its own and is a separate legal entity pursuant to s 41 of the CA. Similarly, the individual directors that have been sued by the plaintiff are merely directors of Mega Planner, Vita Resources, Zentrico, Pelantar and Temasek Teguh that has their own entity separate from their personal capacity, respectively.

[21] The defendants have relied on the principle of separate legal entity and as they are not party or privy to the letter of award to Mega Planner, there is no way that they are liable for Mega Planner's indebtedness towards plaintiff.

[22] The defendants submit that the winding up of Mega Planner was in accordance with the winding up rules and the court cannot go behind the judgment. Further, plaintiff never files any proof of debt and therefore, is not entitled to the claim.

A RELATIONSHIP BETWEEN THE COMPANIES

[23] For ease of understanding, it is important to lay down facts to show the relationship between the two companies Mega Planner and Dakota, and their directors, which had allegedly conspired to defraud plaintiff.

B

Mega Planner Sdn Bhd ('Mega Planner')

[24] Mega Planner was the company that awarded plaintiff the project that is building and construction works in Taman Melati.

C

[25] Defendant 4 was a director of Mega Planner at the time of filing this suit and has been a director since 25 January 2017.

D **[26]** Defendant 1 was a Mega Planner director from 29 April 2014 until 26 January 2017.

[27] Defendant 3 was a Mega Planner director from 16 April 2012 until 26 January 2017.

E

[28] Mega Planner has three shareholder companies namely Syarikat Pelantar Segar (M) Sdn Bhd ('Pelantar'), Zentrico Sdn Bhd ('Zentrico') and Vati Resources Sdn Bhd ('Vati Resources').

F **[29]** Pelantar is the main shareholder of Mega Planner. Defendant 2 is a director and also a shareholder of Pelantar from 17 May 2018 until at the time of filing of this suit.

G **[30]** Defendant 1 was a director of Pelantar from 7 January 2008 until 19 April 2012. Defendant 1 was also a director of Zentrico from 22 August 2014 until 26 January 2017.

[31] Defendant 4 is the current director at the time of filing of this suit and has been a director in Zentrico since 25 January 2017.

H

[32] Defendant 3 is a current director of Vati Resources and has been a director therein since 29 December 2012.

I ANALYSIS AND FINDING OF THIS COURT

[33] Section 540 of the Companies Act 2016 ('the CA').

S 540(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on

with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[34] In the case of *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479; [2016] 4 MLRA 180, the court explained the purposes of s 304 which is equivalent to s 540 of the 2016 CA that:

[16] The primary object behind sub-s 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons.

[35] It was submitted by the learned counsel for the plaintiff that it is appropriate for the court to lift Mega Planner's corporate veil as it can be shown that the Mega Planner has been set up for fraudulent purpose and in this case, it has the intention to defraud plaintiff together with several other companies associated with it, in particular, Dakota. As was stated by Richard Malanjun FCJ in the case of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 MLRA 107 as follows:

... [96] But in the event that we should, we are of the view that it is now settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality (see: *Prest v Petrodel Resources Limited and others* [2013] UKSC 34).

...

[97] As to what constitutes fraudulent purposes it has been described so as to include actual fraud in equity (see *Law Kam Loy & Anor v Boltex Sdn Bhd and Others*). And fraud in equity occurred in '... Cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...' (see *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1996] 2 MLRA 147; [1997] 1 CLJ 529; [1997] 1 AMR; per Chong Siew Fai FCJ as he then was).

[36] By virtue of the authorities, I am of the view that in order to determine whether based on the facts, this is a fit and proper case for piercing the corporate veils of the companies, I have to consider whether there is an intent

to defraud on the part of Mega Planner and Dakota.

THE DEFENDANTS ARE AWARE OF DEBTS DUE BY MEGA PLANNER TO THE PLAINTIFF

[37] It is an agreed fact and as testified by plaintiff witness 1 (PW1) that plaintiff has completed its work in accordance with the letter of award provided by Mega Planner. The letter of award was subsequently terminated mutually by plaintiff and Mega Planner in December 2013 as a result of default payment of interim certificate by Mega Planner. After the termination, plaintiff has submitted Final Account Claim (Progress Claim No 16) to the quantity surveyor ('QS') for valuation on 12 April 2014. The QS then commented on the draft final account and forwarded the same to Mega Planner to the attention of defendant 1. The final account was placed in Part A of the bundle of documents as the existence and contents were not disputed by the parties. As such, there should not be any doubt that defendants knew the debts were due to plaintiff since 2014. This was also admitted by defendant 3 during cross-examination that Mega Planner had received the draft final account from the QS on 28 October 2014 and was aware there was a sum due and owing by Mega Planner but in fact, has intentionally refused to repay the sum.

[38] It was in evidence that the final account was duly endorsed by the QS in early 2019 upon several requests made by plaintiff on 8 October 2018 and 9 November 2018. The endorsed final account was sent to Mega Planner vide plaintiff's letter dated 9 January 2019.

[39] The amount due stated in the final account was never disputed by Mega Planner and pursuant to cll 26.6 and 30.10 of PAM Contract 2006, the statement of final account shall be final and conclusive, which was also admitted by defendant 3 during his cross-examination.

THE DEFENDANTS HAVE PLANNED AND FRAMED THE WINDING UP PROCEEDINGS AGAINST MEGA PLANNER BY USING DAKOTA

[40] At the outset, this court noted that it is an agreed fact that defendants have jointly and/or severally wound up Mega Planner through Dakota.

[41] The plaintiff submits that defendants are the common directors and/or shareholders in Dakota and Mega Planner. In fact, defendant 4 was the director of both Mega Planner and Dakota during the time that Dakota initiated its action against Mega Planner. Defendant 4 only resigned as a director of Dakota on 30 November 2018 which is after Dakota had obtained the JID against Mega Planner on 27 November 2018. It is clear that defendants are aware that

Mega Planner has debts due to the plaintiff and has intentionally wound up Mega Planner in order to avoid its responsibility to pay the plaintiff.

DAKOTA AND MEGA PLANNER ARE RELATED COMPANIES

[42] It is admitted by defendant 1 and defendant 3 in their respective witness statements that Dakota is the subsidiary of Mega Planner. It was also admitted by defendants 1 and 6 during their respective cross-examination. Defendant 1, during cross-examination, admitted and confirmed that Mega Planner and Dakota are related companies and Dakota is the subsidiary of Mega Planner as follows:

> MT: Now in your Q&A to No 9 you said Mega Planner offered the project work to a subsidiary of Mega Planner known as Dakota, which has the same address as Mega Planner.
>
> TAY: Yes.
>
> MT: Yes, so listen to my question. Am I correct to say that both companies are actually related, meaning Dakota and Mega Planner?
>
> TAY: Not really because the shareholder is different between, not all the shareholders is same.
>
> MT: So you said it's a subsidiary.
>
> TAY: It's a subsidiary.
>
> MT: But you say it's not related.
>
> TAY: It's related but not all the shareholders is not the same.
>
> MT: So end of the day related or not?
>
> TAY: Is related.

THE JUDGMENT IN DEFAULT OF APPEARANCE (JID) ENTERED BY DAKOTA AGAINST MEGA PLANNER

[43] Dakota has initiated a claim against Mega Planner at the Shah Alam High Court on 3 October 2018. A judgment in default of appearance was entered against Mega Planner by Dakota on 27 November 2018 ('JID'). It is submitted by plaintiff that defendants have conspired with each other in framing the suit against Mega Planner and made Dakota enter the JID against Mega Planner so that they can use the said JID to wind up Mega Planner.

[44] During cross-examination, defendant 1 has admitted that he had actually recorded the judgment against his own company:

> MT: But you have, we have established in Court you were in Dakota, you were in Mega Planner. Similar people occur, come in and out of these two companies. So

this judgment, I'm telling you, do you agree this is actually a judgment where you recorded against your own company, which you own also, which is Mega Planner?

TAY: The ... Yes, I have a share in the company.

[45] This court noted that despite not holding the director's position in Mega Planner, both defendants 1 and 3 testified that Mega Planner had decided not to defend the claim initiated by Dakota as they find that there were no merits in defending the same. Based on this, I am inclined to agree with the learned counsel for plaintiff to conclude that defendant 1 and defendant 3 are the ultimate controllers in Mega Planner. Otherwise, how would they know or have the power to give testimony that Mega Planner has decided there is no merit in defending the claim. Further, there is every possibility that defendant 1 and defendant 3 have actually planned for the winding up of Mega Planner.

[46] The defendants have also been cross-examined to ascertain the validity of the claim by Dakota against Mega Planner as defendants have failed to provide the letter of award dated 16 December 2014 and 1 June 2014 and/or any proof to show that Mega Planner was owing to the sum of RM5,890,724.10 to Dakota which are the basis of Dakota's claim against Mega Planner as stated in para 3 of the statement of claim filed by Dakota against Mega Planner on 3 October 2018.

[47] Defendant 1 is aware of the existence of such documents and such claim against them and yet have failed to tender the same in court:

TAY: There's a contract because Dakota and Mega Planner different entity.

MT: So, you have possession of this contract?

TAY: Yes

MT: Is it in your possession?

TAY: You mean, would I have it or what?

MT: In your company.

TAY: Yes, should have.

MT: You never produce them in trial.

Tay: I, because —

MT: You never produced them in trial, am I correct, Mr Tay?

TAY: Yes. No produce.

MT: Where are the resolution? Where is the LA between Mega Planner and Dakota? Where is the payment cert between Mega Planner and Dakota? Where is the interim cert between Mega Planner and Dakota? They are not in Court. You agree?

TAY: They terminate themselves — A

MT: Listen to my question.

TAY: OK.

MT: You said you know what Plaintiff is claiming against you. So I'm telling you that all these documents are not in Court. The LA between MP and Dakota. The payment cert, the interim cert, ok between Mega Planner and Dakota. The resolution where you said that the majority actually decided to wind up. All three documents are not in Court today. Do you agree? B

TAY: Should be in the office. C

MT: So it's not in Court?

TAY: No, I don't know. There is so much, I don't know whether which one in Court, which one ... I don't know.

MT: You are very evasive. D

TAY: I don't know.

[48] Due to the failure of defendants producing and explaining why those documents were not tendered in court clearly casting doubts as to the validity of the claim. Hence, an adverse inference could be drawn against the defendants for failing to tender the letter of award or any proof to substantiate Dakota's claim on Mega Planner. E

[49] A case in point is *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38; [2014] 6 MLRH 91 where the High Court found that sevebth defendant is not a truthful witness and drew an adverse inference on the failure of the seventh defendant to adduce relevant documentary evidence and cited the cases below in para 37 of his judgment: F

[37] Nonetheless, in civil cases (not criminal matters), the court has the discretion to draw an adverse inference under s 114(g) EA against the seventh defendant for the seventh defendant's failure to adduce relevant documentary evidence as explained above. I rely on the following appellate cases: G

(i) Supreme Court's *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1990] 1 MLRA 532; H

(ii) COA's *Chan Yoke Lin v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303; [1998] 2 MLRA 272;

(iii) COA's *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; [2006]2 MLRA 210. I

[50] Aside from the failure of defendants to produce the documentary evidence, this court also found that defendant 1 was also unsure of the details of its claim against Mega Planner which eventually became the basis of Mega

Planner's winding up petition. Defendant 1 could not tell the time when was the sum due. In fact, defendant 1 agreed that the statement of claim filed by Dakota against Mega Planner was lacking in the particulars of the purported outstanding sum due by Mega Planner.

MT: 4, ok. Paragraph 4, Dakota has said, Defendan telah membuat bayaran separa untuk kerja-kerja LA1 dan LA 2 dan gagal membuat bayaran baki sebanyak RM5.8 juta sehingga kini. Correct?

TAY: Yes.

MT: Do you agree that this paragraph lack details?

TAY: lack of details?

MT: Yes. It never said that when was paid, how much was paid to come to the final balance of RM5.8 million.

TAY: Ok.

MT: Do you agree?

TAY: Yes.

[51] Further, it is also this court's finding as submitted by plaintiff that the purported debts owed by Mega Planner are not reflected in Dakota's financial report. The financial report of Dakota for the year 2018 did not capture any debts due from the customers on contracts and also there are no expenses for any construction works was captured in the financial report of Dakota for the year 2017 despite defendant 1's testimony that the project was completed around 2016 or 2017. This was also admitted by defendant 1 during his cross-examination.

[52] Based on the SSM search, instead of showing debts, the financial information of Mega Planner shows that Mega Planner has current assets in the sum of RM12,563,639 and is making a profit after tax of RM7,014,381. As such, there is no reason for Dakota to wind up Mega Planner by using the alleged debt of RM5,952,052.19 except to defraud the creditors of Mega Planner so as to avoid payment of debts to the creditors, especially the plaintiff. Defendant 1, during cross-examination, has also agreed and admitted that even with RM6m debts, Mega Planner has no problem financially in 2018 and despite that, Mega Planner was wound up by Dakota, a company that the defendants own and control.

MT: Alright. Do you agree based on paragraph (b), it says the contingent liability for the company is only about RM6.3 million. And this is actually LAD's claim by house buyers. You agree?

TAY: It mention there, yes.

MT: Ok. So, with the contingent liability of RM6.3 million, with the liability of

RM14 million, Mega Planner said that it would have no problem financially until 2018. Correct?

TAY: From here, RM12 million on this, RM6 million, ok.

MT: Correct, yes?

TAY: Ok.

MT: Ok.

TAY: Correct.

[53] Based on the above, this court could support plaintiff's contention that defendants have framed and created the whole process from entering the JID to the winding up process and allowed it to happen. Defendant 2 during cross-examination has also admitted that once the company is being wound up, the company will not need to pay any debts to the creditors:

MT: Tak faham? Ok. Sekarang, ok, Mega Planner sudah tak ada lagi, betul kan?

CHONG: Ya.

MT: Ok. Mega Planner tak ada, dia tak boleh bayar hutang kepada orang lagi. Betul kan? Betul? Siapa yang pergi gulungkan, Dakota ini, gulungkan Mega Planner? Dakota kan, betul tak?

CHONG: Dakota, ya.

MT: Dakota pergi gulung Mega Planner. Betul?

CHONG: Ya.

MT: So, sekarang saya kata Dakota gulungkan Mega Planner, so Mega Planner tak payah bayar hutang orang lain lagi, setuju tak?

CHONG: Setuju.

INTENTION TO DEFRAUD PLAINTIFF

[54] Based on the above, it could be seen that defendants are aware of the outstanding payment due by Mega Planner to the plaintiff at all material times and have planned the whole process from entering JID to winding up to avoid the repayment of debts owed to plaintiff. Further, defendants have also attempted to intervene in the plaintiff's leave application to proceed with legal action against Mega Planner by using Dakota, to file an intervener application. It was defendant 6 who had affirmed the affidavit in support to intervene in plaintiff's leave application. Defendant 6 has testified that he has in fact received instruction from Tay (defendant 1) to sign the affidavit.

[55] As such, this court is satisfied that defendants have every intention to frustrate or hinder plaintiff's claim against Mega Planner and try to avoid its

liability to plaintiff. Premised on that, this court opines that plaintiff has successfully proven that defendants actions are dishonest and their actions are not those ordinary standards of reasonable and honest people would have done (see *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 1 MLRA 238).

DEFENDANT 1 AND DEFENDANT 3 ARE THE CONTROLLING MINDS OF MEGA PLANNER AND DAKOTA

[56] The plaintiff has submitted that defendants 1 and 3 are the ultimate controllers for both Mega Planner and Dakota whereas defendant 2, 4, 5 and 6 are the agents to defendants 1 and 3. Defendants 1 and 3 have control over Dakota and Mega Planner through shareholding companies and appointed defendants 2, 4, 5 and 6 as their nominees in order to avoid detection that they are the controlling figure or mind of Dakota and Mega Planner.

[57] This court is of the view that based on the testimonies of the defendants themselves, this could be very well the position of defendants 1 and 3. During cross-examination, defendant 1 admitted that he is still the shareholder of Mega Planner. Defendant 1 also admitted that he is actually involved in both Dakota and Mega Planner as follows:

> MT: So you are telling me, although you are not a director but you are till involved in these two companies.
>
> TAY: I assist.
>
> MT: Yes, you are still involved lah.
>
> TAY: Yes.
>
> MT: Ok. So, in deciding whether to give time to Mega Planner, ok.
>
> TAY: Yes.

[58] The above contention regarding the involvement of defendant 1 in both companies was corroborated by defendant 2 who testified that her husband, defendant 1, 'buat business' at Dakota and Mega Planner.

> MT: So kalau macam tu, setujulah dengan saya Mr. Tay, dia ada buat business di dalam Syarikat Dakota, betul tak?
>
> CHONG: Betul.
>
> MT: Ok. Untuk di Syarikat Mega Planner, suami kamu Mr Tay juga buat business di dalam Mega Planner, betul? Dia ada kerja untuk Dakota, dia ada kerja untuk Mega Planner, betul?
>
> CHONG: Betul.

[59] Based on the above, this court supports plaintiff's contention that defendant 1 has control over Mega Planner, being the shareholder of Mega Planner as admitted by him and also through the testimony of defendant 2, his wife, who is the director and shareholder of Mega Planner's majority shareholding company, Pelantar. Whereas for the involvement of defendant 1 and 3 in Dakota, it is not disputed that defendant 1 and defendant 3 are the current directors and shareholders of the 100% shareholding company of Dakota, ie Temasek Teguh. It is admitted by defendant 1 during cross-examination that Temasek Teguh is the ultimate controller of Dakota.

MT: Temasek Teguh is the ultimate shareholder of Dakota, am I correct?

TAY: Yes.

DEFENDANT 1 AND DEFENDANT 3 ARE SIGNATORIES FOR MEGA PLANNER AND DAKOTA

[60] It is submitted before this court that even after his resignation from Dakota on 15 March 2017, defendant 1 is still in control of the financials of Dakota and in fact, is still the signatory of Dakota to issue and approve cheques for Dakota on 30 November 2017, 30 December 2017, 31 January 2018, 28 February 2018 and 2 November 2018 respectively.

[61] Whereas for defendant 3, although not holding any position in Dakota but as a director and shareholder in Temasek Teguh (100% shareholding company of Dakota), defendant 3 is also one of the signatories for Dakota. Pages 16 to 20 of Bundle A show the cheques issued by Mega Planner on 28 February 2013, 1 July 2013, and 20 September 2013, the signatories on the cheques are similar to the cheques issued by Dakota which are all signed by defendant 1 and defendant 3.

[62] Based on the foregoing, this court concluded that both defendants 1 and 3 are the mastermind and the controlling minds of Mega Planner and Dakota. Defendant 1 and defendant 3 were the persons who awarded the Taman Melati Project on behalf of Mega Planner, to plaintiff and ever since, plaintiff has been following up the progress of the project with defendants 1 and 3. Furthermore, plaintiff's witness, PW1, Mr Chuah Liang Chuan, who had previously dealt with Dakota, has also dealt with defendants 1 and 3 in their negotiations for a settlement with Dakota.

[63] It is also found that defendant 1 was aware that Mega Planner was being wound up on 24 April 2019 by referring to WhatsApp conversation between himself (DW1) and PW1, despite the court order for the winding up only given on 14 May 2019. The question is, how would defendant 1 knows about Mega Planner being wound up, in advance, had he not been involved in

Dakota and Mega Planner's decision-making process.

[64] The defendants have been taking the position that companies are separate legal personalities and henceforth, their contention is that defendants could not be linked in whatever ways to the actions by the companies as these companies have separate legal entities. The plaintiff, on the other hand, submits that defendants' position is baseless and void. In the case of *Gurbachan Singh Bagawan Singh*, His Lordship stated that the corporate veil ought to be lifted if a corporation was established to avoid an existing obligation or even to prevent abuse of a corporate legal personality. Another case in point is *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622; [2021] 4 MLRA wherein the Federal Court in affirming the Court of Appeal decision and held that Tony Ong, the 'controller' of both companies, has utilised the companies to enable the debts due to the plaintiff to be evaded and used the company as a sham company to ensure that no effective enforcement could be taken by the plaintiff to recover the debt which was deliberately contracted by Tony Ong. Nallini Pathmanathan FCJ in her judgment states as follows:

> [54] It is important to note that the case law in both this jurisdiction and the common law position in the United Kingdom recognises that there subsists a well-established principle that if a company's separate legal personality is being abused for the purpose of wrongdoing, the court is justified in disregarding the corporate personality of the company. The substantial body of case law in favour of this proposition is considerable and even Lord Sumption in Prest stated that he 'would not for my part be willing to explain that consensus out of existence.' That is evident in the leading case of *Salomon v Salomon* itself. It is also clear that where there is fraud, that fraud unravels everything as alluded to earlier (see *Denning LJ in Lazarus v Beasly*).

CONCLUSION

[65] Based on the foregoing, it could be summed up that this is a proper and fit case to invoke s 540 of the CA as the factual matrix clearly shows the defendants, in particular, defendant 1 and defendant 3 are the ultimate controllers, conspired to defraud plaintiff by using Dakota to wind up Mega Planner which are indebted to the plaintiff.

[66] It has been established through documentary and oral evidence of witnesses that the business of Mega Planner has been carried out with the intent to defraud the plaintiff and the defendants were knowingly, parties in the carrying out of that fraudulent purpose. The winding up action of Mega Planner was premised on a JID and not on merits, wherein, lack of details in the statement of claim was not challenged simply because the petitioning creditor was its related company, Dakota. This fraudulent act of winding up Mega Planner also shows proof that defendants in fact had no intention of paying the debt from the outset. Mega Planner was wound up notwithstanding it is

financially healthy. This clearly indicates there was no basis for such an action and the petitioning creditor has an ulterior motive ie to avoid paying debts to the plaintiff. In short, the winding up of Mega Planner is a sham and hence, a fraudulent action on the part of the defendants.

[67] The facts also show that the business of Mega Planner and Dakota was carried out by the ultimate controllers, namely defendant 1 and defendant 3 and the other defendants 2, 4, 5 and 6 were knowingly parties to the carrying on of the business in that manner. Defendants had jointly and severally taken advantage of their separate legal entity and s 540 of the CA ought to be invoked to ensure the principle of the separate legal personality and limited liability are not wrongfully taken advantage of (see *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2015] MLJU 2247; [2015] MLRAU 413).

[68] As such, there is basis in law and in fact, for this court to allow the lifting of the corporate veil of Mega Planner, Dakota and their related companies to determine who are behind the companies that are responsible for the fraudulent acts of winding up Mega Planner. Defendants 1, 2, 3, 4, 5 and 6 are therefore jointly and severally liable without any limitation of liability, for all debts of Mega Planner to the plaintiff.

[69] The facts have sufficiently shown that the winding up of Mega Planner is an abuse of the court process and the defendants had wrongfully and deliberately conspired for the sole intention to injure and/or to avoid paying the debt to the creditors of Mega Planner, in particular, plaintiff.

[70] Therefore, on the balance of probabilities, I find that evidence arising from the pleaded case is sufficient to impute liability on the defendants. They are therefore, jointly and severally responsible personally, without any limit to liability, for the debts of Mega Planner to plaintiff and are liable to pay to plaintiff RM17,012,816.88 as special damages and/or any amount awarded by the court (to be assessed) to plaintiff.

Order accordingly.

Reported by Ashok Kumar